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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT NORFOLK

ALEXANDROS THEODORAKIS

v. IN ADMIRALTY NO. 7308

JOHN XILAS, as Master, et al

MEMORANDUM BY THE COURT ON A MOTION FOR SUMMARY JUDGMENT

While there is no procedure in admiralty known as a motion for summary judgment in the sense that it is used in the Federal Rules of Civil Procedure, the Court will treat the present motion as a request for an interlocutory decree for the payment of wages. It appears by admission that in March, 1947, while in the port of Baltimore, Maryland, the respondents paid the libellant the sum of $250.00 on account of unearned wages. This constitutes a violation of the United States Statute, 46 USCA 599, for which a decree must be entered for the libellant against the respondents. Korthinos v. Niarchos, 4th Cir. 175 F. (2d) 730. There is no justification for allowing "waiting time"; it is denied on the authority of Korthinos v. Niarchos, supra.

(sgd) ALBERT V. BRYAN

United States District Judge

Alexandria, Virginia
April 6, 1950

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

ALEXANDROS THEODORAKIS,
Petitioner,

v. IN ADMIRALTY NO. A-7308

JOHN XILAS, as master, et als
and the SS ALFIOS, *Respondents*

INTERLOCUTORY DECREE

This matter came on to be heard on the motion for summary judgment heretofore filed by the libellant, to which motion the respondents filed written objection, exceptions and response, and the Court being of the opinion that the libellant is entitled to an interlocutory decree in his favor for a certain amount of wages advanced to the said libellant in contravention of Title 46 U.S.C.A. Section 599, as follows:

Alexandros Theodorakis, Baltimore, Md.
March 1947—$250.00.

The Court doth so DECREE and AWARD the sum of $250.00 to the libellant accordingly.

And, it appearing to the Court that the sum of $250.00 has been deposited in the registry of the Court to the credit of the libellant and his proctors, the Clerk of this Court is directed to draw his check paying the said sum of $250.00 to Messrs. Morewitz & Morewitz, proctors of record for the libellant, as follows:

To: Messrs. Morewitz & Morewitz,
attorneys for Alexandros Theodorakis,
$250.00.

And the Court upon consideration of the motion of libellant for "waiting time" and penalties as claimed

under Title 46 U.S.C.A., Section 596-597 for withholding wages "without sufficient cause" is of the opinion that the failure of respondents to pay libellant the advances claimed does not constitute a withholding without sufficient cause; it is accordingly ADJUDGED, ORDERED and DECREED that libellant is not entitled to an award of penalties as claimed under Title 46 U.S.C.A. 596-597.

To which judgment of the Court in granting an interlocutory decree in favor of libellant for wages advanced, the respondents object and save their exception, and to which order of the Court denying waiting time claimed to be due, the libellant objects and saves his exception.

(sgd) ALBERT V. BRYAN
United States District Judge

Norfolk, Virginia
May 23, 1950

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

ALEXANDROS THEODORAKIS
v. IN ADMIRALTY NO. 7308
JOHN XILAS, as Master, et al

DECREE

This cause came on to be heard on the 17th day of January, 1952 upon the libel, answers, and other papers in the record and was argued by counsel. And, thereupon, proctors for libellant moved the Court for a nonsuit, which motion was taken under advisement and the

Court's memorandum, opinion and decision thereon was handed down on January 31, 1952 in which the court provided as follows:

> "The court now being of the opinion that the libellant is entitled to take a non-suit without prejudice, upon payment of costs, it is "ADJUDGED, ORDERED and DECREED that if the libellant shall pay the statutory costs accrued in this suit to this date, this cause shall be dismissed without prejudice, but if the said costs are not so paid this cause will be dismissed with prejudice, provided, that in neither event shall the order of dismissal vacate or modify the decree or decrees hereinbefore entered in this cause but the same shall become final upon said dismissal.
>
> "And this cause is continued for 30 days to allow the payment of the said costs."

Now pursuant to the said memorandum, opinion and decision and it appearing to the Court that the libellant has not paid the statutory costs of suit accruing to January 31, 1952, it is ADJUDGED, ORDERED and DECREED that this suit be, and the same hereby is, dismissed with prejudice to the rights of the libellant, Alexandros Theodorakis, as against John Xilas, Theofana Maritime Company, Ltd. and S. Livanos & Company, Inc. and the steamship ALFIOS.

It is further ORDERED and DECREED that all bonds and stipulations given and entered into by any of the parties hereto be, and the same are, hereby released, cancelled and discharged.

(sgd) ALBERT V. BRYAN

United States District Judge

March 26, 1952

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

AT NORFOLK

ALEXANDROS THEODORAKIS

v. IN ADMIRALTY NO. 7308

JOHN XILAS, as Master, et al

MEMORANDUM BY THE COURT

This suit has been pending since May 28, 1949. On September 28, 1951 the Court insisted that it be disposed of and set it for trial on January 17, 1952. This advanced date was to give all parties ample time to prepare for the trial.

On the trial date the case was not reached until late in the afternoon, about six o'clock P.M. It was then called and the Court denied the motion filed by the libellants on December 17, 1951, asserting the insufficiency of the answers of the respondents to certain discovery proceedings and asking for judgment, and directed that the case be resumed the next day for the taking of evidence.

Thereupon proctors for the libellant stated to the Court that there would be no reason for them to return to court the next day because they had available no evidence to submit, and then moved the Court to grant the libellant a non-suit.

As discussed in the memorandum of the Court filed in No. 7397, Kamara et al v. SS ATLANTIC EMPEROR et al, the Court is of the opinion that the

libellant is entitled to a non-suit under the circumstances in this case. This is true even though an interlocutory decree has been entered, for the subject matter thereof is separable from the remainder of the cause. Confiscation Cases 74 US 454, 457; Jones v. Securities Commission 298 US 1, 19. However, the non-suit should be conditioned upon the payment of the costs by the libellant, the costs to be only those fixed by statute. Even when the right to a non-suit is, of course, the court has the discretion to make it contingent upon the payment of costs. This rule is not altered by the statute permitting a seaman to proceed without the prepayment of costs. 28 USCA 1916. That Act does not release him of subsequent liability for costs.

A decree will be entered granting the motion of the libellant for a non-suit without prejudice upon payment, within 30 days, of the costs as taxed under the controlling statute; if the costs are not paid within the prescribed period, tne suit will be dismissed with prejudice.

(sgd) ALBERT V. BRYAN
United States District Judge

Alexandria , Virginia
January 31, 1952

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT NORFOLK

ALEXANDROS THEODORAKIS
v. IN ADMIRALTY No. 7308
JOHN XILAS, as Master, et al

This cause came on to be heard on the 17th day of January, 1952, upon the libel, answers, motion filed

December 17, 1951 and other papers in the record, and was argued by counsel.

Upon consideration whereof, the Court overruled the said motion, and thereupon proctors for the libellant stated that they had available no evidence to offer and moved the Court to grant the libellant a non-suit without prejudice, the latter motion being opposed by the respondents, and the Court took the said motion under advisement.

The court now being of the opinion that the libellant is entitled to take a non-suit without prejudice upon payment of costs, it is

ADJUDGED, ORDERED and DECREED that if the libellant shall pay the statutory costs accrued in this suit to this date, this cause shall be dismissed without prejudice, but if the said costs are not so paid this cause will be dismissed with prejudice, provided, that in neither event shall the order of dismissal vacate or modify the decree or decrees hereinbefore entered in this caus, but the same shall become final upon said dismissal.

And this cause is continued for 30 days to allow the payment of the said costs.

(sgd) ALBERT V. BRYAN
United States District Judge

Alexandria, Virginia
January 31, 1952

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SUPREME COURT OF THE UNITED STATES

No. 410.—October Term, 1952.

Adam Thomas, Petitioner, v. Hempt Brothers, a Partnership.	On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

[March 9, 1953.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner Thomas sued the respondent Hempt Brothers in a Pennsylvania Court of Common Pleas to recover overtime wages, liquidated damages, and counsel fees under the provisions of §§ 6, 7 and 16 (b) of the Fair Labor Standards Act.* The complaint alleged these facts: Hempt Brothers operate a stone quarry in Pennsylvania, use the stone in manufacturing cement mixtures, and then haul these mixtures in trucks to customers. Their customers were the Pennsylvania Turnpike, the Pennsylvania Railroad Company, an airport, an army depot, and a navy depot, all located within the state of Pennsylvania. The concrete was processed for use by these customers on Pennsylvania projects. The Railroad used its concrete for repair and maintenance of its roadbeds over which were operated interstate passenger and freight trains. The Turnpike used its concrete for laying and building "a highway which handles the flow of commerce between the states." The airport used concrete to build and erect landing fields to accommodate the flow of airplanes in interstate commerce. Other purchasers used their concrete on "projects which aided the flow of commerce, as will be proven by Plaintiff when he has his day

*52 Stat. 1060, as amended, 63 Stat. 910, 29 U. S. C. §§ 206, 207, 216 (b).

in Court." Thomas was employed in producing and handling the quarry and concrete products.

On these allegations the Supreme Court of Pennsylvania sustained the trial court's judgment for Hempt Brothers entered on the ground that the complaint failed to show a recoverable cause of action under the Fair Labor Standards Act. 371 Pa. 383, 89 A. 2d 776. And see 62 Pa. D. & C. 618, 626 (1948); and 74 Pa. D. & C. 213, 218 (1950). In sustaining dismissal of the complaint the State Supreme Court recognized that its holding was in conflict with that of the Third Circuit in *Tobin* v. *Alstate Construction Co.,* 195 F. 2d 577. We granted certiorari because of this conflict. 344 U. S. 895.

We have today affirmed the Court of Appeals' judgment in the *Alstate* case, — U. S. —. The reasons we gave for affirming that case require that this case be reversed because the state courts erred in holding that the complaint failed to set out a good cause of action under the Fair Labor Standards Act. Accordingly the judgment of the Supreme Court of Pennsylvania is reversed and the cause remanded to that court for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS dissent for the reasons stated in the dissenting opinion in No. 296, *Alstate Construction Co.* v. *Durkin, ante,* p. —.